Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1978

No. 78-1024

JEANETTE P. STRONGIN,

Appellant,

-against-

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF MOUNT VERNON,

Appellees.

Appeal from the Court of Appeals of the State of New York

STATEMENT AS TO JURISDICTION

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EWALD B. NYQUIST, Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF MOUNT VERNON,

Appellees.

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Court of Appeals of the State of New York entered on June 15, 1978, and the order of that Court denying a motion for reargument entered on September 14, 1978, by which judgment and refusal to rehear, the Court of Appeals of the State of New

York confirmed the actions of the Board of Education of the School District of the City of Mount Vernon which had dismissed the appellant as a public school teacher, the aforesaid action taken notwithstanding the fact that a panel appointed pursuant to New York State Education Law, Section 3020-a had found appellant "Not Guilty" of all charges brought against her, and notwithstanding the fact that the Appellate Division of the Supreme Court of the State of New York had reversed the actions of the Commissioner of Education. Appellant sets forth the following statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a sub-

stantial question is presented.

OPINIONS BELOW

The decision of the panel appointed pursuant to Education Law Section 3020-a finding appellant "Not Guilty" is set out in Appendix A.

The determination of the Board of Education discharging appellant is set out in Appendix B.

The decision of the Commissioner of Education confirming the actions of the Board of Education is set out in Appendix C.

The decision of the Appellate Division of the Supreme Court reversing the decision of the Commissioner of Education and the Board of Education is set out in Appendix D.

The decision of the Court of Appeals of the State of New York reversing the Appellate Division and reinstating appellant's discharge is set out at Appendix E.

The decision of the Court of Appeals of the State of New York denying appellant's motion for reargument is set out at Appendix F.

JURISDICTION

This case began when appellee Board of Education brought charges against the appellant, charging the appellant with incompetency in her position as a tenured guidance counselor in appellee board's district. The said charges were brought pursuant to New York State Education Law Section 3020-a. Appellant

demanded a hearing, and in accordance with the provisions of New York State Education Law Section 3020-a, a panel was convened consisting of a representative selected by appellant, a representative selected by appellee Board of Education, and a third person selected by the first two. In addition, a hearing officer was selected by appellee Commissioner of Education. Following the hearing, the panel unanimously found appellant "Not Guilty" of each and every one of the specifications. The Board of Education, relying on the decision in *LeTarte v. Board of Education*, 65 Misc. 2d 147, rejected the panel's findings and found appellant guilty and termi-

nated appellant's services. Appellant appealed the actions of the Board of Education by a direct appeal to the New York State Commissioner of Education pursuant to the provisions of New York State Education Law Section 310. The Commissioner sustained the findings of the Board of Education. Appellant then commenced a proceeding pursuant to New York State Civil Practice Law & Rules, Article 78, which resulted in a finding by the New York State Supreme Court affirming the determination of the Commissioner of Education. On appeal, the Appellate Division of the Supreme Court of the State of New York reversed both the lower court and the Commissioner

of Education to the extent of finding appellant guilty of only two of the specifications and imposing a penalty consisting of a six month suspension without pay (*Strongin v. Nyquist*,54 A.D. 2d 1031). On appeal by appellees Board of Education and Commissioner of Education, the New York State Court of Appeals reversed the Appellate Division (44 N.Y. 2d 943) and sustained both the lower court and the Commissioner of Education in their confirmation of the actions of the Board.

The jurisdiction of the Supreme Court to review this decision is conferred by Title 28 United States Code, Section 1251(2). The following decisions sustain the jurisdiction of

the Supreme Court to review the judgment on appeal in this case:

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921);

Nashville C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935).

STATUTES INVOLVED

New York State Education Law Section 3020-a insofar as applicable to this matter, provides as follows:

> §3020-a. *Hearing procedures and penalties.*
> 1. Filing of charges. Except in cities having a population of one million or more, all charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, three thousand twelve, three thousand thirteen and three thousand fourteen of this law shall be in writing and filed with the clerk of the school district or employing board during the period between the actual opening and closing of the school year for which the employee is normally required to serve.***

***

2. Disposition of charges. Upon receipt of the charges, the clerk of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail. The employee may be suspended pending a hearing on the charges and the final determination thereof.***

***

c. Hearing procedures. The commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence.

***

4. Post hearing procedures. Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty if one is warranted, to the employee and to the clerk of the employing board. Within thirty days of receipt of such hearing report the employing board shall determine the case by a vote of a majority of all the members of such board and fix the penalty or punishment, if any, which shall consist of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position for full pay for any period of suspension and the charges expunged from his record.

***

QUESTIONS PRESENTED

1. Can a tenured teacher be discharged following a hearing held pursuant to a statute that was held to be unconstitutional?

2. Was appellant's due process violated by virtue of the fact that appellee Board failed to give reasons for its actions?

3. Was appellant's due process violated by virtue of the fact that appellee Board had a substantial pecuniary interest in the outcome of the hearing?

4. Was appellant's due process violated by virtue of the fact that appellee Commissioner of Education failed to require the Board to give reasons thereby violating his own rules?

STATEMENT OF THE CASE

In 1970 the New York State Legislature voted to amend the Education Law by the enactment of Section 3020-a thereof (L. 1970, Ch. 717, eff. July 1, 1970). This new section provided for the type of hearing to be held when tenured teachers were brought up on charges by administrators of the school district in which they were employed. Under the law, a hearing was to be held before a panel of three persons, one of whom was selected by the Board of Education, one of whom was selected by the accused teacher, and the third selected either by the first two, or by the Commissioner of Education. In addition, a hearing

officer was appointed by the State Commissioner.

The law also provided that after the panel reached its decision and made its recommendations, the Board of Education has the right to either accept, reject or modify such recommendation (*LeTarte v. Board of Education*, 65 Misc. 2d 147, 316 N.Y.S. 2d 781 [Sup. Ct., Hamilton Co. 1970]).

In November 1972, appellee Pratella preferred charges against appellant, charging her with various acts of misconduct and incompetency. A hearing was held before a panel convened pursuant to Section 3020-a and following the said hearing, the panel rendered a decision, finding appellant not

guilty of each and every specification contained in the charges (Appendix A).

Appellee board of education rejected the determination of the panel and voted and found appellant guilty of the specifications and terminated appellant's services (Appendix B).

Appellee board of education set forth no reasons for its actions.

Appellant then commenced an appeal to the New York State Commissioner of Education, who rendered its decision sustaining the findings of the board of education (Appendix C).

During the pendency of the appeal to the Commissioner of Education, appellee board again failed to set forth any reasons for its action notwith-

standing the specific requirements of the rules and regulations of the Commissioner of Education (8 NYCRR 275.12).

Appellant then appealed the Commissioner's decision to the court and the Appellate Division of the New York State Supreme Court reversed both the Commissioner of Education and the Board of Education, and proposed a penalty against the appellant of six months suspension without pay (Appendix D).

On appeal, the New York Court of Appeals reversed the Appellate Division and reinstituted the determination of the Board of Education, terminating appellant's services (Appendix E).

Motion for re-argument was denied by the Court of Appeals on September 14, 1978 (Appendix F).

In the interim, a challenge to the constitutionality of Education Law Section 3020-a was raised and sustained by United States District Court for the Western District (*Kinsella v. Board of Education,* 378 F. Supp. 54, affd. 542 F 2d 1165 [2d Circ. 1976]).

The District Court held that the law as enacted was defective in that it did not specifically provide for the board of education to either read the record of the hearing, or based its decision on the record, or to give reasons for its decision.

Some nine days after the decision by the District Court in the *Kinsella* case, the New York State Board of Regents amended the rules and regulations of the Commissioner of Education to provide for such a review (*Hodak* [illegible] *v. Central School Dist. No. 1*, 78 Misc. 2d 91, affd. 48 A.D. 2d 302 [3rd Dept. 1975]).

The result is that appellant's rights of due process had been violated by the fact that the hearing was unconstitutional.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Due process is a right guaranteed to tenured teachers by the Fourteenth Amendment and by numerous decisions of this Court. As the late Mr. Justice Frankfurter so eloquently stated

in *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123 (1950), 173-174:

> "Due process is not confined in its scope to the particular form in which rights have heretofore been found to have been curtailed for want of procedural fairness. Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice it is also a living principle not confined to past instances."

New York Education Law Section 3020-a was enacted in 1970 (L. 1970, Ch. 717) for the purpose of providing tenured teachers with a greater degree of due process. While the new law provided for greater protection for the tenured teacher in the manner in which the hearing was conducted, the

law provided that the decision of the panel was advisory only and that the board of education could accept or reject the panel's finding (*LeTarte v. Board of Education,* 65 Misc. 2d 147, 316 N.Y.S. 2d 781, Sup. Ct. Hamilton Co., 1970). It was this factor that led to the finding by the District Court in *Kinsella v. Board of Education,* 378 F. Supp. 54, affd. 542 F. 2d 1165 (2d Circ. 1976), that Section 3020-a was unconstitutional on the grounds that there were no set procedures for review of the record by the board of education, coupled with the fact that the board was not required to give reasons for its decision. This thinking was set forth

by the court in the following language (378 F. Supp. at 60):

> "Not only does the procedure outlined above fail to insure that the school board's decision will be based on evidence elicited at the hearing, it provides no safeguards against the school board basing that decision on ex parte evidence. Furthermore, the problem is exacerbated by the fact that the school board is not required to render a written decision setting forth its reasoning and the factual basis for its decision." (emphasis added)

The decision of the District Court was based in part upon the decision of the United States Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1969), in which the court stated (90 S. Ct. at 1022):

> "The decision maker's conclusion...must rest solely on the legal rules and evidence adduced at the hearing. (citations omit-

> ted). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on***"

It was not until February 28, 1974, nine days after the *Kinsella* decision, that the New York State Board of Regents amended the Commissioner of Education regulations (8 NYCRR 82.2-82.10) so as to cure the defect in the statute (*Hodgkins v. Central School District No. 1*, 78 Misc. 2d 91, affd. 48 A.D. 2d 302 [3rd Dept. 1975]). Section 82.11 of the new regulations provides:

> "The decision of the board of education shall be based solely upon the record in the proceedings before the hearing panel, and shall set forth the reasons and the factual basis for the determination."

The charges against the appellant were filed in 1972 and the decision of the board was rendered in 1973. Both actions occurred during a period of time in which the statute under which appellant was discharged was unconstitutional as depriving her of her rights of due process.

The denial to appellant of her rights of due process was compounded by the failure of the Board to give reasons for its actions.

A reading of the decision of the board of education (Appendix B) shows that the board did not set forth any reasons for its determination nor the factual basis for its determination.

The fact that appellant had the right to seek either a judicial review under CPLR Article 78 or a quasi-judicial review under Education Law Section 310 does not cure the constitutional defect. This point, too, was rejected by the court in *Kinsella* in the following language (378 F. Supp. at 60):

> "This court finds that an appeal under Article 78 of the New York CPLR cannot correct the constitutional defects of Section 3020-a. Since the school board is not required to set forth reasons in support of its decision, a review of the factual determination relied upon by the board becomes illusory. Simply stated, there will not be an adequate record for a state court to review. See *United States v. Merz*, 376 U.S. 192, 84 S. Ct. 639, 11 L. Ed. 2nd 629 (1964)".

Similar requirements are mandated by New York Courts. In *Fogel v. Board of Education*, 48 A.D. 2d 925 (2d Dept. 1975), the court held that the teacher had the right to see the trial examiner's report before the board of education acted on the findings (See also *Sorrentino v. State Liquor Authority*, 10 N.Y. 2d 143 [1961]).

Not only was there a very serious violation of procedural due process, but appellant's rights were further violated by the fact that appellee board was not impartial. An impartial decision maker is a basic constituent of minimum due process and any other procedural guarantees are largely without meaning if the deciding tribunal has in some way adversely pre-

judged the merits of the case (*Simard v. Board of Education*, 473 F.2d 988, 993 [2d Cir. 1973]).

This Court in *Tumey v. Ohio*, 273 U.S. 510 (1927), and again in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), held that where the final decision maker had a pecuniary interest in the outcome of a case, participation by that body will deny the accused of due process.

In both judicial decisions in this matter there is reference, directly and indirectly, to the fact that appellant was illegally suspended without pay.

The Appellate Division changed the findings of the board from discharge

to a six month suspension without pay, while the Court of Appeals, in its decision, while reinstating the discharge, gave her the right to seek to recover the amount of money due for the period that she had been illegally suspended without pay. Both rulings are based upon the decisions in *Meliti v. Nyquist,* 41 N.Y. 2d 183 (1976) and *Jerry v. Board of Education,* 35 N.Y. 2d 534, 364 N.Y.S. 2d 440 (1974). Both cases held that such suspensions were illegal and directed that the teacher be compensated for the period of illegal suspension.

Appellee board had illegally suspended appellant on November 3, 1972, some six months prior to the actual

discharge of petitioner. As a result, it had a very clear and substantial pecuniary interest in the ultimate outcome of the case. Had the board adopted the findings of the panel, it would have had to pay appellant her salary for the period during which she was illegally suspended. In addition the board would have had to explain to the people of Mount Vernon why it had expended so much money in prosecuting an innocent teacher (*Boyce v. Alexis I. du Pont School District*, 341 F. Supp. 672, 678 [D. Del. 1972]).

A further violation of appellant's rights arose as the result of the actions of the Commissioner of Education.

The New York Court of Appeals, in its decision, pointed out that appellant had the option of seeking either a judicial review of the board's actions or a quasi-judicial review by the Commissioner of Education. Clearly, whichever review appellant sought, she was entitled to have a review conducted in accordance with the rules and regulations of the forum she chose.

Appellant chose to have her case reviewed by the Commissioner of Education. In doing so she accepted certain limitations on a subsequent review by the courts of the Commissioner's decision. That is the very point that the Court of Appeals emphasized in its decision. However in order to be held to that limitation, the Com-

missioner had an obligation of reviewing petitioner's appeal in accordance with the rules and regulations that had been established for such review. Section 275.12 of the Rules and Regulations of the Commissioner of Education provides:

> "The answer of each respondent shall contain a clear and concise statement of his defenses of each claim and shall neither admit or deny the allegations of the petition."

A reading of the answer submitted by the appellee board to the Commissioner fails to reveal any reasons set forth for its decision, thereby violating the Commissioner's own regulations. Yet the Commissioner did not ask the Board to submit the reasons.

Not only didn't the Commissioner require the board to give its reasons, but the Commissioner, in his decision, did not give reasons for sustaining the board. In both instances the due process requirement that reasons be given were violated (*Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011 [1969]).

A wrong was done to Mrs. Strongin by both the Board of Education and the Commissioner of Education in the failure to grant her fundamental rights of due process. A wrong once done cannot be embraced by the courts of this country even if such a wrong can ultimately be undone (*Fuentes v. Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556 [1972]).

Clearly a wrong was done to Mrs.

Strongin and this wrong, which has resulted in her discharge, can only be undone if the determination is set aside.

CONCLUSION

Based on the foregoing, appellant respectfully submits that she has been denied the due process which this Court has held she was entitled to, and such denial of due process should prompt this Court to exercise its jurisdiction in this case.

Respectfully submitted,

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APPENDIX A — DECISION OF PANEL CONVENED PURSUANT TO EDUCATION LAW SECTION 3020-A

DECISION

Charge I — *Inefficiency and Incompetency*

Specification — 1. That between in or about the months of May, *1968,* January, *1969,* your actions in negligently reviewing the file of one Mildred Saunders prevented her graduation from the Mount Vernon High School in June, 1968.

Letter of February 7, 1969 respondent's Exhibit B clearly states that Mrs. Strongin's suspension was lifted without prejudice. "I do not believe that a mistake of this kind, the first of this nature in your long years of service warrants a formal hearing . . ."

The panel feels that Superintendent Franko's letter along with Mrs. Strongin's testimony that she had asked for the girl to be graduated, supported by Petitioner's Exhibit #15, exonerates her from being penalized for the same charges a second time. This matter had already been resolved.

Specification — 2. That you are incapable of relating to high school students concerning their personal problems in educational matters, and that you have exhibited indifferent and hostile attitudes towards such students which have resulted in numerous requests by students and parents for a change of guidance counselor. The names of some of the complainants are: Bettie Glover, Veronica Matthews, Walter Battie, Gayle Aronson, Ronald Manna, Irene Petinakis, Katherine Sheppared, Theresa Groupper and Jacquie Lomont.

The panel feels that the facts presented by the witnesses (students) were contrary to the opinions they expressed. The

testimony failed to prove that Mrs. Strongin was incapable of relating to high school students. Example: Students said they could not get to see Mrs. Strongin, yet they added they only saw her two or three times in a short period of time. Students stated that she would not listen to them, yet in almost every instance she effectuated either changes in schedules or indicated referrals. The general problem that exists between guidance counselor, students, and teachers is one of expectations and an interpretation of role. It is inherent in this kind of relationship that misunderstandings will occur, and in this case they have been magnified out of proportion.

> *Specification* — 3. That on or about October 5, 1972, you misinformed a substantial number of students assigned to you regarding the completion of the application for Regents, Scholarship and Qualification Test by instructing each of them to check a particular box on the form which would have precluded them from receiving a regents scholarship.

In reviewing the testimony we find that Mrs. Strongin was not informed that any complaint had been made in this regard until the charges were brought, Mrs. Strongin's supervisor, Mrs. Liebman, had never held a conference with Mrs. Strongin regarding the matter and offered no documentation to substantiate the charge.

The events upon which this charge is based occurred more than two years prior to the charges being made. This extended time lapse, without prior communication to Mrs. Strongin from her supervisor regarding this problem, makes it impossible for the panel to resolve the disparity in testimony. In the absence of formal or written communication, we find we cannot accept this charge as serious.

> Charge II — *Insubordination, Neglect of Duty, and Conduct Unbecoming a Teacher*

Appendix A

> *Specification* — 1. That on several occasions during the 1970/71 school year, you refused, without just cause to take students assigned to you for counseling.

The testimony of the Board's witnesses indicates at most that Mrs. Strongin protested the assignment of additional students but never that she refused to take them.

> *Specification* — 2. That on several occasions during school years 1971/72 and 1972/73, you spoke to students assigned to you in a loud and abusive manner, and have made such students unwelcome in your office, notwithstanding that you were admonished to cease and desist from such practice.

The panel did not discover conclusive evidence that Mrs. Strongin spoke in a loud and abusive manner and that she made students feel unwelcome. If in fact she had, the panel feels that it was incumbent upon her administrator to advise her and guide her towards more acceptable behavior. By their own testimony there were no conferences, no written evaluations and no concrete guidelines set down for Mrs. Strongin. There is no evidence that Mrs. Strongin was ever admonished to cease and desist from such practice. (Testimony pages 338 and 339 — Mrs. Liebman's testimony that there were no written evaluations of Mrs. Strongin's job performance from her or anybody else in a supervisory capacity.) (Testimony, pages 339, 340, 341, — Mrs. Liebman's testimony that she never individually communicated with Mrs. Strongin professionally or socially.)

> *Specification* — 3. During school years 1971/72 and 1972/73 you have discouraged students from pursuing their education in that you have made them feel that they do not have the ability to achieve their educational goals.

The panel cannot find any evidence to support this charge.

> *Specification* — 4. That on or about November 18, 1971, you were abusive, insulting and disrespectful to a fellow counselor one Sylvia Berger, when she attempted to discuss with you a counselee, one Walter Battle, who had been originally assigned to you and was later reassigned to Mrs. Berger.

The panel finds there is no evidence relating to this incident that can be construed as supporting the charge. It feels that the primary basis for any problems arising from this incident was a matter of personality conflict between Mrs. Strongin and Mrs. Berger.

> *Specification* — 5. That on or about November 4, 1971, in the presence of Mrs. Barbara A. Feiden, Director of Upward Bound, her Administrative Assistant and a student Walter Battle, you belittled the ability of said student and criticized him in a cold, sarcastic and insensitive manner.

This Specification indicates that Mrs. Strongin allegedly criticized Walter Battle in a cold, sarcastic and insensitive manner. Upon reviewing the testimony of Mrs. Feiden the Panel noted that this witness could not specifically recollect any words that would substantiate this charge. Pages 44-ff in the testimony give indication that it was a feeling rather than words that made her make this kind of unsubstantiated judgment. The only direct quote in Mrs. Feiden's testimony was "Walter was not qualified to take data processing because he did not have the necessary grade point average". This statement by Mrs. Strongin was never controverted by any testimony. Furthermore, Mrs. Feiden lacked the specific information regarding Walter Battle's program and programming needs for graduation or college.

> *Specification* — 6. That on several occasions during school year 1971/72, you neglected on several occasions to report to the head counselor's office although you

were requested to do so, and offered no valid excuse for not so doing.

Specification #6 refers to "several occasions during the school year"; however, testimony was only provided relating to a single incident and said testimony demonstrated that Mrs. Strongin did in fact report to the head counselor's office upon receipt of a formal request to do so.

> *Specification* — 7. That on several occasions during the school year 1971/72 you went outside normal channels in complaints to division and high school principals.

The panel finds that Mrs. Strongin did operate through normal channels. The one incident testified to in regard to this Specification indicates that Mrs. Strongin had spoken to Mrs. Hunt before going to the principal.

> *Specification* — 8. That on many occasions during the school years 1970/71 and 1971/72 you have been rude, arrogant and disrespectful towards other staff members and employees.

There is abolutely nothing in the record that substantiates this charge.

> *Specification* — 9. That your course of conduct has had a demoralizing effect on both staff members and students and has interfered with the orderly operation of the guidance program and department.

In reviewing the testimony the panel cannot find any evidence of claim by the school board that Mrs. Strongin has a demoralizing effect on staff members of students, or has interfered with the operation of the guidance program and department.

Appendix A

SUMMARY STATEMENT

The panel unanimously agrees that the charges against Mrs. Strongin were unsubstantiated by the evidence presented. Our determination is that Mrs. Strongin should be fully reinstated without prejudice.

ADDENDUM

The panel wishes to express its extreme concern regarding the underlying causes that resulted in the bringing of these charges. It feels that this deplorable set of circumstances was the direct result of improper supervision and direction in the administration of the guidance department and the school system.

/s/ Diane Gess
/s/ William G. Sweet
/s/ Fred Nauman

APPENDIX B — DETERMINATION OF BOARD OF EDUCATION

In The Matter Of Charges Filed Against JEANETTE P. STRONGIN,

A Tenured Teacher

MOUNT VERNON SCHOOL DISTRICT

DETERMINATION

Hearings having been duly held at the Education Center, Mount Vernon, New York, on the 15th, 21st and 27th days of December, 1972, before Frank S. McCullough, Jr., Esq., Hearing Officer, and Mrs. Diane Gess, Mr. Fred Nauman and Mr. William Sweet, Panel Members, pursuant to Section 3020 A of the Education Law of the State of New York to hear charges preferred against Mrs. Jeanette P. Strongin, a guidance counselor assigned to the Mount Vernon High School, by Dr. William C. Prattella, Superintendent of Schools, to determine the following charges:

CHARGE I — *Inefficiency and Incompetency*

Specification — 1. That between in or about the months of May, 1968, January, 1969, your actions in negligently reviewing the file of one Mildred Saunders prevented her graduation from the Mount Vernon High School in June, 1968.

2. That you are incapable of relating to high school students concerning their personal problems in educational matters, and that you have exhibited indifferent and hostile attitudes towards such students which have resulted in numerous requests by students and parents for a

change of guidance counselor. The names of some of the complainants are: Bettie Glover, Veronica Matthews, Walter Battle, Gayle Aronson, Ronald Manna, Irene Petinakis, Katherine Sheppared, Theresa Groupper and Jacquie Lomont.

3. That on or about October 5, 1972, you misinformed a substantial number of students assigned to you regarding the completion of the application for Regents Scholarship and Qualification Test by instructing each of them to check a particular box on one form which would have precluded them from receiving a regents scholarship.

CHARGE II — *Insubordination, Neglect of Duty, and Conduct Unbecoming a Teacher*

Specification — 1. That on several occasions during the 1970/71 school year, you refused, without just cause, to take students assigned to you for counseling.

2. That on several occasions during school years 1971/72 and 1972/73, you spoke to students assigned to you in a loud and abusive manner, and have made such students unwelcome in your office, notwithstanding that you were admonished to cease and desist from such practice.

3. During school years 1971/72 and 1972/73 you have discouraged students from pursuing their education in that you have made them feel that they do not have the ability to achieve their educational goals.

4. That on or about November 18, 1971, you were abusive, insulting and disrespectful to a fellow counselor one Sylvia Berger, when she attempted to discuss with you a counselee, one Walter Battle, who had been originally assigned to you and was later re-assigned to Mrs. Berger.

5. That on or about November 4, 1971, in the presence of Mrs. Barbara A. Feiden, Director of Upward Bound, her Administrative Assistant and a student Walter Battle, you belittled the ability of said student and criticized him in a cold, sarcastic and insensitive manner.

6. That on several occasions during school year 1971/72, you neglected on several occasions to report to the head counselor's office although you were requested to do so, and offered no valid excuse for not so doing.

7. That on several occasions during the school year 1971/72 you went outside normal channels in complaints to division and high school principals.

8. That on many occasions during school years 1970/71 and 1971/72 you have been rude, arrogant and disrespectful towards other staff members and employees.

9. That your course of conduct has had a demoralizing effect on both staff members and students and has interferred with the orderly operation of the guidance program and department; and

Appendix B

After reading the transcripts of the aforesaid hearings and the decision of the panel, a copy of which decision is annexed hereto, and due deliberation having been had thereon, it is hereby determined as follows:

1. That all of the charges and specifications preferred against Mrs. Jeanette Strongin are substantiated by a preponderance of the credible evidence adduced at the hearings.

In reaching this determination, this Board has considered not only the individual charges and specification but their cumulative nature and affect on the school system as well.

2. That her suspension without pay which became effective on November 6, 1972 is hereby affirmed, and the employment of said Jeanette P. Strongin is terminated, the penalty being dismissal.

3. That the determination herein has been duly made by a vote of a majority of the members of the Board of Education taken at a meeting duly held on the 27th day of March, 1973.

Dated: March 28th, 1973.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF MOUNT VERNON, NEW YORK

BY: M. Joseph deMarinis
M. JOSEPH deMARINIS
President

APPENDIX C — DECISION OF COMMISSIONER OF EDUCATION

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT BEFORE THE COMMISSIONER

IN THE MATTER

OF THE

Appeal of JEANETTE P. STRONGIN from action of the Board of Education of the City School District of the City of Mount Vernon and William C. Pratella, Superintendent of Schools, with regard to her dismissal as a tenured teacher.

Eugene M. Kaufman, Esq. . . . attorney for petitioner Stephen Perelson, Esq., of counsel

Joseph R. Zibelli, Esq. . . . attorney for respondent

Petitioner began employment as a teacher in the respondent district in 1953 and was granted tenure as a teacher. In 1958 she was appointed as a guidance counselor, served in that capacity through June 1965 and acquired tenure as a guidance counselor. Petitioner continued as guidance counselor in the respondent district at the junior high school and senior high school until November 6, 1972, when she was suspended without pay, charges having been brought against her and probably cause having been found for such charges on November 3, 1972. The charges included three counts of inefficiency and incompetency and nine counts of insubordination, neglect of duty and conduct unbecoming a teacher.

Pursuant to section 3020-a of the Education Law, a hearing was held on December 15, 1972. The hearing panel concluded that petitioner was not guilty of the charges brought against her

and recommended reinstatement. The respondent board of education on March 27, 1973, upon the receipt of the hearing panel's report, found that petitioner was guilty of all charges and affirmed her suspension without pay and terminated her employment. Petitioner appeals from that decision and seeks reinstatement as a guidance counselor in the respondent district.

The record indicates petitioner was charged with inefficiency and incompetency in that she negligently reviewed the file of a student, thereby preventing the student from graduating when she should have. The transcript of the hearing afforded to petitioner, which contains more than 500 pages, indicates without a doubt that petitioner was negligent in reviewing the file of the student and that because of her oversight that student was not allowed to graduate when she should have.

With regard to the charge that petitioner was incapable of relating to students and that she was indifferent and hostile towards them, several students testified at the hearing as to petitioner's unavailability and inability to communicate with them.

While the findings and recommendations of hearing panels convened pursuant to the provisions of Education Law section 3020-a are entitled to great weight, the final responsibility for determining whether the charges have been sustained and for fixing the penalty, if any, to be imposed rests with the board of education. Those determinations may not be set aside unless found to be arbitrary, capricious, contrary to law, or an abuse of discretion. Upon the record before me, I find no basis for setting aside the determinations of respondent in this case.

THE APPEAL IS DISMISSED.

Appendix C

IN WITNESS WHEREOF, I, Ewald B. Nyquist, Commissioner of Education of the State of New York, (SEAL) for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 28th day of November 1973.

s/ Ewald B. Nyquist
Commissioner of Education

APPENDIX D — DECISION OF APPELLATE DIVISION, THIRD DEPARTMENT

Supreme Court—Appellate Division
Third Judicial Department

November 10, 1976 29398

In the Matter of JEANETTE P. STRONGIN,

Appellant,

v.

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, et al.,

Respondents.

Appeal from a judgment of the Supreme Court at Special Term, entered December 13, 1974 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to vacate and set aside the decision of respondents, Commissioner of Education and Board of Education, finding petitioner guilty of all of the charges and specifications against her, and terminating her services as a tenured teacher in the Mount Vernon School District.

Petitioner, a tenured teacher, had charges preferred against her and, after a hearing pursuant to section 3020-a of the Education Law, the hearing panel unanimously found petitioner not guilty. The Board of Education rejected the panel's findings, found the petitioner guilty and immediately discharged her. Petitioner filed an appeal with the Commissioner of Education who sustained the board's action. An article 78 proceeding was thereafter commenced against the Commissioner of Education and the Board of Education. The petition was dismissed in all respects and this appeal ensued.

Replying upon *Kinsella v. Board of Education* (378 F. Supp. 54) petitioner urges that section 3020-a of the Education Law was unconstitutional at the time of these proceedings due to the fact that it did not require that the school board's decision be based upon the record developed before the hearing panel and the fact that it did not require that the school board render a written decision setting forth its reasoning and factual basis for its decision. When the constitutionality of a State statute is in question, notification of the Attorney General is required (Education Law, §71; CPLR 1012, subd. [b]). It was not given here. We deem it immaterial, however, for we find it unnecessary to reach the constitutional issue since the record reveals that the board specifically stated in its determination that it arrived at its decision after deliberation upon the transcripts of the hearings. We are also of the view that the board sufficiently stated the reasons relied upon for the determination (*Goldberg v. Kelly,* 397 U.S. 254).

Petitioner claims a denial of due process in that the board had an alleged financial interest in the outcome of the proceeding and because the board ruled upon whether or not there was probable cause after the filing of charges. It has been held that a person with a substantial pecuniary interest in a dispute should not participate in its adjudication (*Ward v. Village of Monroeville,* 409 U.S. 57; *Tumey v. Ohio,* 273 U.S. 510). Considering that we are dealing with the pay of only one school counselor, we are of the opinion that the board did not have such a substantial pecuniary interest so as to disqualify it as a decision-maker under these circumstances. Since the record fails to disclose any evidence that the board members were actually biased against the petitioner, we also find no violation of petitioner's due process rights due to the combination of decision making and investigatory powers in the board (*Matter of Jerry v. Board of Educ. of City School Dist. of City of Syracuse,* 44 A D 2d 198, rearg. 50 A D 2d 149, mod. 35 N Y 2d 534; *Matter of Buffalo Teachers' Federation v. Helsby,* 35 A D 2d 318).

Appendix D

Having dealt with petitioner's due process arguments, we now reach petitioner's contention that the board's findings are not supported by substantial evidence. Two charges were filed against petitioner. The first charge alleged inefficiency and incompetency and consisted of three specifications. Based on the record we find substantial evidence to support the board's findings as to each of the specifications and, therefore, the board's determination as to this charge is sustained. The second charge brought against petitioner alleges insubordination, neglect of duty, and conduct unbecoming a teacher and consists of nine specifications. A review of the record reveals substantial evidence to support only the allegations contained in specifications 3, 4 and 5. A finding that petitioner committed the minor transgressions alleged in these specifications wholly fails to support the board's determination that petitioner was guilty of the second charge.

While section 310 of the Education Law provides that a decision of the Commissioner shall be final and conclusive and not subject to question or review in any place or court, it does not preclude the court from reviewing a decision which is purely arbitrary or irregular (*Matter of Vetere v. Allen,* 15 N Y 2d 259). In view of our conclusion that charge II is not supported by the record, the Commissioner's action as to that charge is arbitrary since it is "without foundation of fact". The penalty imposed by the board, therefore, must be reassessed. Based on the record as a whole we believe that dismissal of the petitioner would be unjustified and an appropriate penalty would be a suspension of six months without pay (see *Matter of Bott v. Board of Education, Deposit Cent. School Dist.,* 51 A D 2d 81).

We have carefully considered petitioner's remaining arguments and find them to be unpersuasive.

Appendix D

Judgment modified, on the law and the facts by annulling so much of the determination as found petitioner guilty of charge II and by reducing the penalty to a suspension of six months without pay, and, as so modified, affirmed, without costs.

KOREMAN, P.J., SWEENEY, KANE, MAHONEY and LARKIN, JJ., concur

APPENDIX E — DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATE OF NEW YORK
COURT OF APPEALS

No. 224

In the Matter of Jeanette P. Strongin,

Respondent,

vs.

Ewald B. Nyquist, Commissioner of Education &c. and Board of Education of the School District of the City of Mount Vernon, et al.,

Appellants.

(224) Louis H.J. Welch & Robert D. Stone, Albany, for appellant State Education Commissioner.

Joseph R. Zibelli, Mt. Vernon, for appellants Mt. Vernon Board & Commissioner.

Eugene M. Kaufman, NY City, for respondent.

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

MEMORANDUM:

The order of the Appellate Division should be reversed, without costs, and the judgment of Special Term reinstated,

without prejudice to an application by petitioner for back pay for the period of suspension to the time of discharge (see *Matter of Bott v. Board of Educ.*, 41 NY2d 265, 269; *Matter of Meliti v. Nyquist*, 41 NY2d 183, 187-188; *Matter of Jerry v. Board of Educ.*, 35 NY2d 534, 543).

Petitioner, a tenured guidance counselor of the School District of the City of Mount Vernon, was charged with (1) "Inefficiency and Incompetency" and (2) "Insubordination, Neglect of Duty and Conduct Unbecoming a Teacher" and was suspended on November 3, 1972, pursuant to subdivision 2 of section 3020-a of the Education Law, without pay pending a hearing on the charges and the final determination thereof (see L 1970, ch 717, eff July 1, 1970, as amended by L 1971, ch 703, eff July 1, 1971, and L 1973, ch 772, eff Sept. 1, 1973). There were three specifications in support of the first charge and nine as to the second. Following a lengthy hearing pursuant to said section, a hearing panel unanimously found that the charges against petitioner were unsubstantiated by the evidence presented, but the Board of Education thereafter determined that all of the charges and specifications were established by a preponderance of the credible evidence and discharged her.[1] On November 28, 1973, the Commissioner of Education, upon an appeal to him, found no basis on which to set aside the board's determination.

Petitioner then commenced this article 78 proceeding to annul the decision of the commissioner and the actions of the Board of Education. Special Term viewed the board's determination as properly supported and dismissed the petition. The Appellate Division, however, found substantial evidence

1. By virtue of section 4 of chapter 82 of the Laws of 1977, effective April 15, 1977, several amendments to section 3020-a of the Education Law were enacted. Under subdivisions 4 and 5, as amended therein, the effect of the findings and recommendations of the hearing panel was altered materially.

only as to the specifications of the first charge and as to specifications 3, 4 and 5 of the second charge and held that a finding of guilt as to those three specifications failed to support the board's determination of guilt of the second charge. It modified the judgment so as to annul so much of the determination which found petitioner guilty of the second charge, reduced the penalty to a suspension of six months without pay, and remitted the matter to Special Term for a determination of the amount to be paid to petitioner in back salary, from the date of suspension to the date of reinstatement.

Petitioner was entitled to review the determination of the board either by appeal to the Commissioner of Education under article 7 of the Education Law or by a special proceeding under CPLR article 78 (Education Law, §3020-a, subd 5). Instead of resorting to the courts in the first instance, petitioner chose to appeal to the commissioner, as she had a right to do, and having made that choice it is the commissioner's decision upon that appeal that is to be reviewed here (*Matter of Chapin v. Board of Education of City of Buffalo,* 291 NY 241, 244, 245; *Anken v. Board of Educ.,* 42 AD2d 1031, 1032; *Matter of Ross v. Wilson,* 284 App Div 522, 526, see *Matter of Bokhair v. Board of Educ.,* 43 NY2d 855).

By virtue of the amendment of section 310 of the Education Law in 1976 (L 1976, ch 857; see Governor's Memorandum of Approval), the test to be applied on this appeal is whether the commissioner's determination, in supporting the board of education and in dismissing petitioner's appeal to him, was arbitrary and capricious (*Matter of Chauvel v. Nyquist,* 43 NY2d 48, 52). In view of the evidence supporting both charges and the serious nature of them, it cannot be said that the commissioner's action was without rational basis and, therefore, it must be upheld (*Matter of Pell v. Board of Educ.,* 34 NY2d 222, 230-231).

* * * * *

Appendix F

Order reversed, without costs, and the judgment of Supreme Court, Albany County, reinstated without prejudice to an application by petitioner for back pay in accordance with the memorandum herein. All concur.

Decided June 15, 1978

APPENDIX F — DENIAL OF MOTION FOR REARGUMENT BY COURT OF APPEALS

Mo. No. 765

In the Matter of the Application of Jeanette B. Strongin,

Respondent,

vs.

Ewald B. Nyquist, Commissioner of Education &c. and Board of Education of the School District of the City of Mount Vernon, et al.,

Appellants.

Motion for reargument denied

Decision Court of Appeals September 14, 1978